IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

Original, Nos. 2 and 3.

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vs.

NOAH C. McFARLAND, Commissioner of the General Land Office.

PETITION FOR MANDAMUS.

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STATEMENT.

The petitions in the cases are based substantially upon the same state of facts, and may be considered together.

The act providing for the admission into the Union of the State of Illinois, approved April 18, 1818, enacts, among other things, "that five per cent. of the net proceeds of the lands lying within the said territory, and which shall

be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the said State, under the direction of the Legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress."

The act providing for the admission into the Union of Iowa, approved March 3, 1845, enacts "that five per cent. of the net proceeds of sales of all public lands lying within said State, which have been or shall be sold by Congress, from and after the admission of said State, shall be appropriated for making public roads and canals within the said State, as the legislature may direct."

On the other hand, certain obligations were imposed upon these States in consideration of the stipulation on the part of the United States to pay the five per cent. of the net proceeds of the lands thus to be sold by Congress, which were of the most onerous character, all of which are embodied in the acts under which these States were admitted into the Union, to which reference is made.

These stipulations, with others, were proposed by Congress to the peoples of these two States for their free acceptance or rejection. If accepted, they were to be obligatory on both parties—the States, respectively, and the United States. They were duly accepted by the States, which have also faithfully observed them.

The Congress, by several acts, all of which are set forth in the appendix to the brief of Messrs. R. P. Lowe and W. W. Wilshire, made grants of land for military services rendered in the three great wars of this country, namely, the Revolutionary war, the war of 1812, and the Mexican war. The language of the act of September 16, 1776, is, "that Congress make provision for *granting* lands." The language of the acts of the Commonwealth of Virginia, whose obligations the United States afterwards assumed,

is, "to provide the following portion of land to be *given* at the close of the war," and "that each person who shall enlist *shall be entitled*," &c.

The language of the acts of Congress of December 24, 1811, and January 11, 1812, is "that there be *allowed* and *paid*," &c. The language of the act of February 6, 1812, is, "shall be entitled to receive."

The act of February 11, 1847, uses the words: "Shall be entitled to receive a certificate or warrant from the War Department for the quantity of one hundred and sixty acres, and which may be located," &c. The ninth section of the act provides "that every such non-commissioned officer, musician, or private who may be entitled under the provisions of this act to receive a certificate or warrant for one hundred and sixty acres of land, shall be allowed the option to receive such certificate or warrant, or a treasury scrip for one hundred dollars; and such scrip, whenever it is preferred, shall be issued by the Secretary of the Treasury to such person or persons as would be authorized to receive such certificate or warrant for lands; said scrip to bear an interest of six per cent. per annum, payable semi-annually, redeemable at the pleasure of the Government; and that each private, non-commissioned officer, and musician who shall have been received into the service of the United States since the commencement of the war with Mexico, for less than twelve months, and shall have served for such term or until honorably discharged, shall be entitled to receive a warrant for forty acres of land, which may be subject to private entry, or twenty-five dollars in scrip if preferred."

The act of March 3, 1847, amendatory of the last preceding act, provides as follows:

"That under the provisions of the ninth section of the act approved February 11th, 1847, entitled 'An act to raise for a limited time an additional military force, and for other purposes,' it shall be the duty of the Secretary of the Treas-

ury to issue Treasury scrip as therein provided, on the certificate of the Secretary of War showing the claimant entitled thereto, and not otherwise, and that the stock thus issued shall bear interest from the day of presenting to the Treasury Department such certificate of the Secretary of War in due form, and the interest thereon shall be paid on the first days of January and July in each year, and shall be transferable on the books of the Treasury Department kept in the Register's office; such certificate shall be signed by the Register of the Treasury under the direction of the Secretary, who shall cause the seal of the Department to be affixed thereto, and no other signature shall be required to said stock."

The act of September 28, 1850, "granting bounty to certain officers and soldiers who have been employed in the military service of the United States," employs the words "shall be *entitled to*."

The Congress enacted certain other laws with respect to warrants for military bounty-lands, which have been incorporated into the Revised Statutes, as follows:

SEC. 2277. All warrants for military bounty-lands, which are issued under any law of the United States, shall be received in payment of pre-emption rights at the rate of one dollar and twenty-five cents per acre for the quantity of land therein specified; but where the land is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

* * * * * * *

SEC. 2414. All warrants for military bounty-lands, which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

SEC. 2415. The warrants which have been or may hereafter be issued in pursuance of law may be located accord-

ing to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States, in cash, the difference between the value of such warrants at one dollar and twenty-five cents per acre and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

The Congress have also imposed certain duties with respect to public lands upon the Commissioner of the General Land Office, by section 456 of the Revised Statutes, which section is as follows:

"SEC. 456. All returns relative to the public lands shall be made to the Commissioner of the General Land Office, and he shall have power to audit and settle all public accounts relative to the public lands, and upon the settlement of any such account he shall certify the balance, and transmit the account with the vouchers and certificates to the First Comptroller of the Treasury for his examination and decision thereon."

The States of Iowa and Illinois having requested the Commissioner of the General Land Office to include five per cent. of the net proceeds arising from lands located with military bounty-land warrants, estimating the lands at $1.25 per acre, in the statements of account between those States, respectively, and the United States, that officer refused to do so. These States thereupon instituted these proceedings.

POINTS.

The questions of law involved are whether or not public lands located by military bounty-land warrants come within the scope of the foregoing stipulations—in other

words, whether or not they are lands "sold by Congress," and if so, whether or not the petitioners have applied to the proper tribunal for the appropriate remedy.

There are only two modes of acquiring property: one by descent or inheritance, the other by purchase, and the latter includes all modes except the former. To purchase is defined "to transfer to another for an equivalent; to give up for a consideration; to dispose of for something, especially money; to exchange; to barter." "*Sell* is correlative to *buy*, as one party *buys* what the other *sells*. It is distinguished from exchange or barter, in which one commodity is given for another, whereas in selling the consideration is *usually* money, or its representative in current notes." These are the definitions obtained from the dictionaries.

Blackstone's definition of sale is a "transmutation of property from one man to another in consideration of some price." (2 Bl., 446.)

Kent's definition is "a contract for the transfer of property from one person to another for a valuable consideration," which would include barter.

Benjamin, in a note to his work on "Sales of Personal Property," 2d ed., p. 5, says: "The chief practical importance of the difference between barter and sale lies in the different form of pleading required in case of breach."

Also: "If the contract is to pay an agreed price for goods received in specific articles of which the quantity is not fixed, the contract is a sale."

So that if we apply the most technical definition to the term "sale," it would seem that the cases at bar come within it. But if we go to the intent of the contracting parties we are relieved of all trouble in reaching the conclusion that the stipulations above not only cover but were intended to cover the cases of the petitioners, for it is manifest that a sale or disposition of all the public lands within the limits of the States, respectively, was within the

contemplation of both governments at the times these stipulations were entered into, and by a compliance with the stipulations the States have become entitled to five per centum of all the sales of all the public lands within their limits, respectively.

The ground, as I understand, upon which payment has been refused by the Commissioner of the General Land Office, is that, in his opinion, entries of public lands by military bounty-land warrants are not a disposition of the public domain within the meaning of the foregoing stipulations. The correctness of this opinion depends largely upon the fact whether or not, as between the United States and the soldier, the lands disposed of formed a part of the latter's hire. That they did, so far as the military land-warrant acts of 1847 are concerned, is abundantly shown by the debate thereon at the time of their passage. When the act of February 11, 1847, came to the Senate from the House, where it originated, an amendment was proposed giving, in addition to the monthly pay and allowances and the money bounty, a grant of land to the soldiers whose enlistment was then sought. The subject was debated at considerable length, and the result was the statute referred to. In the course of the debate Mr. Cameron, the mover of the original amendment, said: "He was desirous that those of our fellow-citizens who intended to join the army might know what they had to expect. The soldier who fought the battles of his country was deserving of reward, and as this Government possessed abundance of lands, he thought no better disposition could be made of a portion of them than in rewarding the bravery and patriotism of the soldiers." Congressional Globe, 2d session Twenty-ninth Congress, p. 171.

Mr. Allen, of Ohio, while objecting to the proposition as not sufficiently guarded and specific, expressed his assent to the principles involved. He said he "was one of those who believed that, as between the Government and the

citizen, great liberality should be observed, more especially as regarded the uncultivated soil of this country. He knew of no better use that could be made of the public domain than to reward the brave and patriotic men who had volunteered to serve in this war." *Ibid.*, p. 172.

Mr. Clayton said: "While graduation bills and preemption bills, and other projects for giving away and breaking up the public domain, were in vogue, while the land was going, he preferred to see it given to the citizen-soldiers and regular soldiers of the United States army; he preferred giving the lands to the soldiers as an inducement to fight the battles of the country rather than give them to the paupers of Europe." *Ibid.*, p. 173.

Mr. Corwin said: "It was a proposition to grant to every soldier who actually served, and to the heirs of every soldier who died in service, an amount equal to $200, which should pass current in any land office for the purchase of land. Instead of paying them in advance it was paying him at the end of his service this amount. * * * A soldier's service was the hardest that any patriot could be called upon to perform, and he thought that they were entitled to receive at the hands of the Government this much at least." *Ibid.*

Mr. Badger said: "If we are to call upon American citizens to enlist in the army for the prosecution of this indefinite war—to enlist not merely for a certain period, but during the existence of the war, * * * was it not important that they should throw out strong inducements to the people to peril their happiness, their persons, and their lives? He saw in this very circumstance strong reasons why this bill should not be passed without a direct 'pledge' of future bounty on the part of the Government to induce men, whether as volunteers or regular soldiers, to make these sacrifices. He desired that every man should see on the face of the law under which the Government required the sacrifice from him, the bounty

at which the country estimates his service." *Ibid.*, p. 178.

Mr. Butler said: "The great object of giving bounty lands to soldiers was to encourage enlistments." *Ibid.*, p. 207.

Mr. Webster said: "The object was to obtain the service of the private soldier in the ranks of the army and in the volunteer corps. * * * The precise point they aimed at was to fill the ranks of the regiments for the efficient defense of the country—the present urgent defense of the country. They asked, therefore, for something which would be an inducement to soldiers to enlist." *Ibid.*

The same question has been agitated in Congress recently, and has received the most careful consideration of the Committees on Public Lands of the two houses constituting that body. While the conclusions arrived at by the committees may not be binding upon this court as authority, they certainly should be in a high degree persuasive, especially when the reasons adduced in support of those conclusions are so cogent and strong. The arguments of both committees are in substance the same, and are substantially as follows:

This compact, (as contained in the stipulations above quoted,) so made at the time these States were admitted into the Union, has been observed and kept on their part in good faith, and they claim the observance of like good faith on the part of the General Government in fulfilling its part of the contract, namely, the payment of the five per cent., being the stipulated consideration that induced the States to enter into and perform their part of the contract. That the Government has done so on all sales of public lands for cash is not disputed. But the non-payment of the five per cent. on all lands upon which military land warrants have been located is not denied, and it is claimed that the Government is under no obligations to pay the

same; it being insisted upon that the lands so taken up do not fall within the compact, while the States interested maintain that the Government is obliged to pay this five per cent. on all lands on which these military warrants have been located. It has been contended that the five per cent. to be paid to these States has reference to cash sales of the public lands, and none other. The States interested maintain that this is not a sound interpretation of the obligations assumed by the Government, and some of the reasons for this claim will be stated.

The several grants of land for military services rendered in the three great wars of this country, namely, the Revolutionary war, the war of 1812, and the Mexican war, were not bounties merely; they were not mere gratuities given by the Government out of a spirit of generosity to the soldiers who served in these wars; they were not granted or received in this spirit, but were by the very terms of most of the acts authorizing the same given in part payment for military services. They entered into and formed a part of the contract of enlistment. The object of these grants was to facilitate and encourage enlistments. In order to fill up the rank and file of the army rapidly, Congress offered in advance, besides specified monthly wages in money, an additional inducement or consideration in lands—not for past service, but for services thereafter to be rendered. The land warrant to be received was as much a part of the stipulated compensation provided for by the law under which the enlistment was made, and entered into the contract just as fully between the soldier and the Government, as his monthly pay did. If these grants had all been made after the rendition of the military services it might be otherwise, but they were not. They were offered as a part of the compensation that would be paid for such services.

Whatever differences of opinion exist as to whether these grants were sales or not, may to a great extent be attributed to a misunderstanding of the term "bounty" as ap-

plied to this kind of reward for military services. It is not used in its popular sense as importing a gratuity, but in the technical sense of a gross sum or quantity, given in addition to the monthly stipend, but given like the latter in consideration of and as payment for services to be rendered. Thus, in the late war, in order to stimulate enlistments, a pecuniary "bounty"—that is, a gross sum in addition to the monthly wages—was offered by the government to all who would enlist in the military service; and in numerous instances further bounties of the same kind were offered and paid by counties and cities in order to induce enlistments to fill up their respective quotas of men.

Such offers, when accepted and acted upon, so completely constituted contracts with the parties enlisting under them, that in repeated instances fulfillment thereof has been enforced by the courts. These pecuniary "bounties," by which enlistments were so largely procured during the late rebellion, occupy precisely the same attitude as respects the question now under consideration as the so-called bounty-land warrants do. Both really were simply extra allowances offered for the same purpose, and when accepted and enlistments made thereunder, they became *ipso facto* contracts which any court would recognize and enforce. In this way the public lands were made available as a resource for defraying the national burdens just as effectually as if they had been converted into money, and the money used in paying the enlisted men. It was an exchange of one valuable thing for another, which in law makes it a case of sale, to constitute which it is enough that the title to property is parted with for a valuable consideration. It is not necessary that there be a moneyed consideration in order to constitute a sale. Any other valuable consideration will be as effectual in supporting a contract and in making a sale which will pass the title, whether it be merchandise, other property, or services. Suppose one man employs another to work for a given period of time, under an agree-

ment to pay him monthly wages at a given price per month and forty acres of land, to be conveyed when the period of service expires, it must be conceded that when the services are rendered the party would be as much entitled to the land as he would be to the stipulated sum per month, and this would as clearly be a sale of the land as if the consideration therefor had been money. The principle involved in the case supposed is precisely the same as in the one under consideration. And if it is a sale in the one case, it is difficult to see why it would not be in the other.

But let us examine this character or mode of disposing of lands by the Unitd States, as constituting a "sale," when it is viewed as a transaction between the Government and the party locating the warrant. Instead of patenting specific land to the soldier entitled thereto, in virtue of his military services, the Government issued to him its written obligation, payable in the agreed quantity of land, to be selected by him from the whole body of lands open for sale and entry throughout the country. These obligations or "warrants" were made assignable by law, and subject to sale and transfer in the market, from hand to hand, by mere delivery. In this way they became practically a species of Government scrip or currency, and persons desirous of becoming land proprietors could and did go into the market and purchase the same, and with them buy the land they wanted; and in this way large quantities of the public lands were disposed of wherever the same was subject to sale and entry at the different land-offices. Now, it is claimed to be against reason and common usage to say that these lands are not sold because the Government receives in payment for them, instead of cash, its own obligations, payable in land. Can it be considered less a case of sale that the purchaser, instead of paying for his lands in greenbacks, does so with the Government's own paper obligations?

The chief difference in the two descriptions of paper is,

that the first is available for purchasing all commodities, indiscriminately, while the latter is limited to purchase of land only. Suppose the United States had issued pecuniary obligations, *i. e.*, bonds payable to bearer at a future day, or payable, like greenbacks, whenever the Government should find itself able, but with the proviso that they should be receivable at par in payment for public lands, how would the case of lands paid for with such bonds differ from the present case? The bonds might have been issued, like land-warrants, for military services, or for any other consideration, or for no consideration. They might have been regarded by Congress strictly as a gratuity to parties thought to have, for any reason, deserved well of their country. The motive or consideration that induced or authorized the issuing of the same would not affect the question whether lands entered and paid for with such bonds ought to be considered as sold or not. In both cases the Government would have received in such disposition of its lands its own valid outstanding obligations, for the fulfillment of which its faith was pledged, and the surrender of which by the holder would constitute an ample consideration, both legal and equitable, for the conveyance. These considerations apply to the fullest extent to the case of entries of land by means of land-warrants. For it is immaterial to the character of this transaction for what consideration such obligation was issued. Its legal capability of assignment has practically imparted to the land-warrant a negotiable quality. It has become part of the general mass of securities passing from hand to hand in the market. The purchaser buys it relying on the faith of the United States for the fulfillment of the agreement embodied in it, and without inquiry as to the consideration in which it originated. In this connection it is proper to state that Congress has treated these warrants for military services as money, both by receiving them in payment for large tracts of land or by authorizing their conversion into scrip and then re-

ceiving this scrip in payment for any public land, wherever situate. This scrip, so issued in lieu of land warrants or in redemption of the same, has always been treated as money by the Government. It has always been received in payment for land just the same as money, and when lands have been taken up by this scrip, representing the land-warrants, the Government has paid the five per cent. to the States where it was situate, while the per cent. has been withheld where the land has been taken up by the warrants themselves. We think no good reason can be assigned for this distinction. The land absorbed by either class of paper is precisely the same in effect, so far as the Government is concerned, and both alike discharge its obligations, and for that very reason the land so absorbed by both classes of paper should be treated as having been sold.

But we are not left to these considerations alone in support of the claim insisted upon by these States. The binding effect of the obligations assumed by the government in the act of Congress for the admission of Alabama into the Union being under discussion, the Attorney-General of the United States (Hon. B. F. Butler) gave an opinion in respect thereto, dated March 31, 1836, as follows:

"This proposition having been accepted by the convention, became and is obligatory on the United States; that is to say, the faith of the nation is pledged to execute it literally, provided the Government of the United States possesses or acquires the ability to do so." (3 O. A. G., 56.)

This is the disinterested opinion of the legal adviser of the government upon the very question under discussion, which entitles it to great consideration.

In addition to this, we submit that the validity of the claims set up and insisted upon by these States has received legislative recognition in at least two acts of the Congress of the United States, one in respect to the State of Alabama, the other in respect to the State of Mississippi, both of which acts we propose briefly to consider.

On March 2, 1855, Congress passed an act entitled "An act to settle certain accounts between the United States and the State of Alabama." This act provides:

"That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled under the act of March 2, 1819, for the admission of Alabama into the Union, and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to said State five per cent. thereon, as in case of other sales."

Subsequently to this Congress passed an act entitled "An act to settle certain accounts between the United States and State of Mississippi and other States," which was approved March 3, 1857, and is as follows:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles and allowance as prescribed in the 'Act to settle certain accounts between the United States and the State of Alabama,' approved the 2d of March, 1855; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State five per centum thereon, as in case of other sales, estimating the lands at the value of $1.25 per acre.

SEC. 2. *And be it further enacted*, That the said Commissioner shall also state an account between the United States and each of the other States upon the same principles; and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at $1.25 per acre.

The settlements authorized and required by these acts between the government and the States of Alabama and Mississippi, and the payment of the five per cent. for these reservations, estimating the land at $1.25 per acre, are a clear recognition of the principle contended for by the States making these applications. The fee to the land in these reservations was granted to the Indians, either out of good-will and to encourage friendly relations, or in part consideration of their possessory right to large tracts of this country surrendered to government. It was no cash sale of the lands to the Indians. So the military land-warrants were granted to the soldiers either as a grateful acknowledgment of their services or in part payment of the same; and whether one or the other, the two cases are the same in principle; and the five per cent. should be paid in both cases or should not be paid in either. But we wish to call especial attention to the provisions of the act with reference to Mississippi, as we think all ambiguity in respect to the question under consideration, if there be any, is removed by the language there used; for, if Congress meant anything, it would seem the Commissioner, by that act, is required to do three things: First. He is to state an account between the United States and Mississippi and the other States, for the purpose of ascertaining what sum or sums of money are due to these States, heretofore unsettled, on account of public lands in said States. Second. He is to include two things in said account, which are all lands and permanent reservations, estimating the same at $1.25 per acre; and, Third. He is to pay five per cent. thereon as in cases of other sales. If Congress did not intend to include all lands upon which military land-warrants had been located as well as permanent reservations, we are unable to see what was intended by the language employed in this act. We think it must be admitted that this account was to include all public lands on which the five per cent. was still unsettled, as well as reservations. And by the express

terms of the act, this necessarily includes the military locations, as these were a part of the public lands on which the five per cent had not been paid. If these lands were not intended to be included, what lands does the act refer to? It cannot be the lands sold for cash, for there was no dispute about them. The government had faithfully complied with its obligations to the States as it respects these cash sales, and had paid the five per cent. on all the lands so sold. Neither can it refer to the reservations, for they were fully provided for by the first section of the act by name, and are to be paid for upon the same principles and allowance as those recognized and provided for in the case of the State of Alabama. And in addition to these reservations the government is to pay on account of *all public lands* in said State of Mississippi upon the same principles and allowance. So that both lands and reservations are clearly provided for in this first section, while the second section provides that the United States shall state an account with the other States upon the same principles, and shall allow and pay to them such amount as shall be found due on account of all lands and reservations, estimating the same at $1.25 per acre. So that other lands than those sold for cash and reservations must be referred to by this act in order to give its provisions force and effect. Indeed, we think that a proper construction of the scope and meaning of this act of Congress would include all lands in these States disposed of by the Government for any purpose other than to the State itself or by the consent of the State. That it is broad enough to, and does, include the lands in question, we think is beyond controversy.

It is further insisted by these States that if the General Government is not obligated to pay the five per cent. on the lands in dispute by the terms of the contract with these States fairly construed, it would be within the power of the Government to convey all the public lands in any State for military services, and in that way defeat any benefit they

were to derive under the contract. It is claimed by these States that as they were to have five per cent. of the proceeds of the sales of public lands, they were to be disposed of only in such manner as would enable them to get this sum therefrom, and that any other disposition of these lands defeats the consideration that induced them to enter into the stipulations provided for on their part. We think there are strong reasons for this position, and that the Govment in all justice cannot dispose of the public lands in these States for military services, and then refuse to pay to them the per cent. provided for by the contract. Suppose that A agrees with B that he will pay him a commission of five per cent. for selling a section of land at a given price, and after making this agreement he directs B to take a given quantity of merchandise for the same, which B does, can there be any doubt that B is entitled to the commission agreed upon for making the sale because the mode of paying for the same is changed by A from cash to merchandise?

And, if not, is not the Government as much bound under its contract with these States to pay the five per cent. agreed upon, where the land is given for and in consideration of military services, as it would be if the sale had been for cash? In other words, the contract presupposes that all the public lands will be so sold and disposed of that the States will realize the per cent. agreed upon; and that no disposition of them, to be made in such manner as to defeat the same, was contemplated at the time; and that such is the implication arising from the contract itself. Such was clearly the view taken by Congress of this question in the acts of March 2, 1855, and March 3, 1857. Hence the language used, "*all lands and permanent reservations;*" and, as if not to be misunderstood, the same are "*to be valued at* $1.25 *per acre.*" Not five per cent. of the proceeds from cash sales, but five per cent. on all lands *disposed of in any other way*, estimating the same at $1.25 per acre. Any other view would defeat this legislation both in letter and

in spirit, and would do violence to every rule of construction known to the law. It could not have been within the contemplation of the parties that Congress might defeat the payment of the five per cent. by some other disposition of the public lands than a sale of the same for cash; for if it had been, this privilege would have been reserved; and it is clearly evident no right whatever was reserved to make any disposition of the same that would relinquish the payment of this five per cent.

By disposing of the public lands in the manner named, the United States discharged an obligation which was of binding force upon all the States as component parts of the common confederacy. Aside from the legal liability of the Government to pay the percentage claimed to the States within whose limits the lands were purchased with military warrants, it may be suggested that *it would be palpably inequitable that a few States should be called upon to contribute so largely in the discharge of the nation's indebtedness.* But when it is considered that the General Government and these two States entered into a solemn compact, partaking of the mutuality of a legal contract; that the States, in order to secure the five per cent. on the disposal of the public lands, agreed to surrender rights indisputable and of great value to them if retained, and that in good faith this agreement has, in every respect, been faithfully kept on the part of the States, there seems to be no good and sufficient reason why the United States should be relieved of its obligation to pay the claims which the States have presented for adjustment."

The committees say that after careful consideration and much deliberation they reached the following conclusions:

"First. That the several enabling acts admitting the new States into the Union, as it respects the payment of five per cent. on the sales of the public lands, do embody the elements of a legal and binding contract between said States and the national government, which both parties are en-

titled to have carried into effect in the same manner and on the same principles as contracts are between individuals.

Second. That the agreement to pay the five per cent. has a sufficient consideration in the concessions made by these States in the acts of admission into the Union, in the surrender of revenue and otherwise, and that it was not within the contemplation of the parties that Congress might defeat the rights of the States to the five per cent. on sales by adopting a policy of disposing of the public lands in some other form than for money, and as a matter of fact the government did not reserve the right to give away the public lands for objects and uses outside of the States, or to withhold the payment of the five per cent. on lands granted for military purposes; and,

Third. That the several grants of lands for military services rendered in the three great wars of this country, namely, the Revolutionary war, the war of 1812, and the Mexican war, were sales in the sense of the law and the meaning of the compact between these States and the national government."

With respect to the binding obligation of "bounty" acts as contracts, the Supreme Court of Iowa, in Perham *vs.* Buchanan, 28 Iowa, 266, say:

"Contracts of this character should be liberally construed in favor of those who, under the inducements thus offered, enter into obligations and a service from which they cannot withdraw, and which are so essential to the maintenance of government."

The same court, in Keough *v.* Scott County, Ib., 342, say:

"Indeed, I may go further, and say that it should be liberally construed in favor of those who hazarded so much for their country, and thereby saved the tax-payers at home from the dangers of the field."

Upon the same question the court, in The People *v.* Martin, 58 Barb., N. Y. Supreme Court Rep., 286, say:

"One who enlisted into the military service, and was credited to the town, under the call of the President of April 14, 1864, was entitled to bounty authorized to be

given to each volunteer credited to the town, and such right might be enforced by mandamus."

Also, in reply to the argument that the bounty was a mere gratuity, the court say:

"It was a debt legalized by statute, even if it was otherwise to be regarded as a mere promise of a gratuity."

In this connection I deem it appropriate to refer to an analogous system, in which the liability of the Government is more remote than in the one now under discussion, but one whose policy is firmly rooted in the minds and hearts of the American people. I mean the pension system, which, in our Government, recognizes two forms of pensions, invalid and gratuitous. Invalid pensions are such as have been and are granted to soldiers who were disabled or contracted disease in the line of duty while in the military service of the country. These pensions assume the form of a contract, whereby the Government agrees with the soldier at the date of his enlistment, in consideration of his enlistment and service, to pay him a pension upon the condition of his being disabled in the line of duty. With respect to such a pension, Mr. Wirt, as Attorney-General, in 1825 said:

"It is in the nature of an absolute engagement or promise made by the Government to these officers and men that, if they fell in the service of their country, so much shall be paid to their widows and children. It is bottomed only on the single condition that the husband and father shall die in the service of his country, on the happening of which condition the public engagement becomes a debt which is as much property of the widow and children as any bond which the deceased may have left them by his will."

Upon the same question Washington said:

"It was part of their (the soldiers') hire. I may be allowed to say it was the price of their blood and of your independence. It is, therefore, more than a common debt;

it is a debt of honor; it can never be considered as a gratuity, nor cancelled until it is fairly discharged."

If it be settled that the disposition of the lands in controversy comes within the purview of the stipulations above stated, the question arises, Have the petitioners applied to the proper tribunal for the appropriate remedy? Indeed, the question of jurisdiction meets us at the threshold.

This court, in Mississippi *v.* Johnson, 4 Wall., 501, say:

"It is true that a State may file an original bill in this court." See section 688 Revised Statutes.

If that be true, no objection to the jurisdiction can be taken on account of the parties plaintiff.

HAVE THE PETITIONERS APPLIED FOR THE APPROPRIATE REMEDY?

Mandamus lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. It lies, also, where the exercise of judgment and discretion is involved, and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal. (Com'r of Patents *v.* Whiteley, 4 Wall., 534.)

It is decided in the case of Kendall *v.* United States, (12 Peters, 524,) that the Circuit Court of the District of Columbia had jurisdiction to issue a writ of *mandamus* to the Postmaster-General to compel him to do a merely ministerial act, which the relator had a complete right, under an act of Congress, to have done by him, and as to which he had no discretion.

The court say: "The authority to issue the writ of *mandamus* to an officer of the United States, commanding him to perform a specific act *required by a law* of the United States, is within the scope of the judicial powers of the United States under the Constitution."

This court, in Commonwealth of Kentucky *v.* Dennison, Governor, &c., say:

"It is well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

The question of the original jurisdiction of this court, and the mode of exercising it, in suits in which a State is a party, plaintiff or defendant, has been elaborately examined by this court. In the case of New Jersey *v.* New York, in 1831, 5 Peters, 284, Mr. Chief Justice Marshall, in delivering the opinion of the court, refers to the case of Chisholm *v.* The State of Georgia, and to the opinions then delivered and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

"It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress."

Again, in Commonwealth of Kentucky *v.* Dennison, Governor, &c., *supra*, in 1860, which was an application to this court, in the exercise of its original jurisdiction, to compel the Governor of the State of Ohio to deliver a person, charged as a fugitive from justice in the State of Kentucky, Mr. Chief Justice Taney, speaking for the court, after referring to the words of Mr. Chief Justice Marshall just quoted, as well as to other cases, says:

"The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show

that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice to which every one is entitled, where it is the appropriate process for asserting the right he claims."

In the case of United States *v.* Schurz, 102 U. S., 395, which was an application for a mandamus to the Secretary of the Interior directing and requiring that officer to deliver to the relator a patent to certain lands, this court, speaking through Mr. Justice Miller, say:

"If the relator was entitled to the possession of the patent to his property, and it was the plain duty of the Secretary to deliver it to him, under all the authorities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of Marbury *v.* Madison (1 Cranch, 137) down to the present time such has been the settled doctrine of this court. And though it may be said that the opinion of Mr. Chief Justice Marshall in that case was not necessary to the decision made—which was that *this* court had no *original* jurisdiction in that case—the principles of the opinion have since been repeatedly recognized and acted upon in this court, and the case cited with approval in its definition of the circumstances under which persons holding offices will be compelled to perform certain duties which are merely ministerial."

So that, under the authorities cited, it seems clear, if this court find as a matter of law that the petitioners are entitled

to have the five per cent. of the net proceeds of lands located by military bounty-land warrants included in their accounts with the United States, they are entitled to the remedy they ask; for the act which the respondent refuses to perform is purely ministerial.

Leaving out of view the act of March 3, 1857, "to settle certain accounts between the United States and State of Mississippi and other States," it will be observed that by section 2277 of the Revised Statutes, above set forth, *all* warrants for military bounty-lands shall be received in payment of pre-emption rights at $1.25 per acre; and that by section 2415 they may be located upon *any* lands subject to private entry, at the minimum price—that is, at $1.25 per acre. Thus the duty of the respondent is reduced to a mathematical calculation of the sum due each State for lands located by such warrants.

The writ of mandamus should be issued.

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